No. 924

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

HUDSON & MANHATTAN RAILROAD COMPANY,
DEBTOR,
Petitioner,

v.

WILLIAM J. HARDING, JR., IRVING I. SCHNUR AND SHIRLEY REITER, PETITIONING CREDITORS,

HERMAN T. STICHMAN, TRUSTEE OF THE DEBTOR,

AND

SECURITIES AND EXCHANGE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONING CREDITORS-RESPONDENTS, IN OPPOSITION.

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Statement

The petitioner (the Debtor) seeks review of a judgment of the United States Court of Appeals for the Second Circuit, which affirmed two interlocutory orders made by the United States District Court for the Southern District of New York in the proceedings in that court for the involuntary organization of the Debtor under Chapter X

of the Bankruptcy Act. Each of these orders denied a motion by the Debtor, addressed to the discretion of the district court, and made long after the entry, upon its answering admissions and consent, of an order approving the involuntary petition and appointing a reorganization Trustee.

The first order (Order No. 28) denied a motion for authorization to employ engineers to make a valuation study at the expense of the trust estate. The second order (Order No. 36) denied a motion for leave to withdraw an "amended answer" filed without leave subsequent to the order of approval, and to file a proposed answer *de novo* which would convert prior admissions into denials and repudiate the Debtor's consent to reorganization under Chapter X.

The relevant facts are stated in the opinion of the Court of Appeals on affirmance, reported at 229 F. 2d 616, and in the opposing brief of the Trustee; and their repetition here would be superflous. We are content to emphasize certain of their salient aspects:

(a) The involuntary petition was filed on August 11, 1954. By obtaining successive orders extending its time to answer until September 24, 1954, and then moving to dismiss, the Debtor postponed answering until December 8, 1954. Obviously, the answer it then filed was carefully considered and seriously intended as a final pleading; and, in view of the ordinary ten day answering period prescribed by Section 136,* the long postponement of the Debtor's original answer was alone sufficient justification for denial of the motion for leave to plead *de novo*.

(b) The motion to dismiss the involuntary petition was made under Rule 12 (b)(1) of the Federal Rules of Civil

* All section references in this brief are to sections of the Bankruptcy Act.

Procedure, on the ground that the district court lacked jurisdiction of the subject matter. It was a "speaking motion", based on affidavits in support of the claim that the Debtor's interurban electric railroad is operated as a part of a general railroad system of transportation and, therefore, that the Debtor must be reorganized under Section 77. The district court decided that question of fact on affidavits, at the urgent request of the Debtor;* and, in its original answer, the Debtor admitted by silence the allegation of the involuntary petition that its interurban electric railroad is not operated as a part of a general railroad system of transportation.

(c) The Debtor's original answer contained admissions sufficient for a voluntary petition under Section 130.

(d) The Debtor withdrew its appeal from the order appointing a receiver.

(e) It did not appeal from the order denying its motion to dismiss the involuntary petition.

(f) It did not appeal from the order dismissing its petition for reorganization under Section 77.

(g) It did not appeal from the order of approval.

(h) The time to appeal from each of those orders had expired long before it made the motions which resulted in the orders now challenged.

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* The opinion, finding that the Debtor's railroad is not operated as a part of a general railroad system of transportation, holding that the Debtor must therefore be reorganized under Chapter X, and denying the motion to dismiss, is reported at 126 F. Supp. 359.

Argument

1. The judgment of affirmance below does not present the questions stated in the petition. Each of the motions below was plainly addressed to the discretion of the district court; and neither of them was based on any substantial ground for the exercise of such discretion in favor of the Debtor.

Even if the issue of insolvency was still material when the Debtor moved for authority to employ engineers at the expense of the trust estate for the purpose of litigating that issue, there is no statutory basis for such authority; and it would have been palpable error to grant it.

The circumstances under which the Debtor suddenly moved for leave to plead *de novo*, and thus to invalidate the order of approval which the Debtor itself had prayed for, are stated in the opinion on affirmance below. They fully justify the finding of the district court that the motion was not made in good faith.

The denial of those motions does not present any question of law appropriate for review by this Court.

2. The jurisdiction of the district court to reorganize the Debtor under Chapter X was finally and conclusively established by the order denying the motion to dismiss and by the order dismissing the Debtor's petition for reorganization under Section 77. The latter order is a final adjudication of the Section 77 issue, and is not subject to collateral attack. *Stoll* v. *Gottlieb*, 305 U. S. 165.

3. The order of approval also constitutes a conclusive determination of the district court's jurisdiction, which is similarly immune from collateral attack. Section 149 of Chapter X provides as follows:

> "An order, which has become final, approving a petition under this chapter, shall be a conclusive determination of the jurisdiction of the court."

The order of approval here became final long before the Debtor made the motions denied below.

The suggestion, at p. 28 of the petition, that Section 149 relates to jurisdiction under Section 23 of Chapter IV, and not to jurisdiction under Chapter X, is preposterous. The language of Section 149 is too plan for such devious distortion; and, under Section 102, Section 23 does not apply to a Chapter X proceeding.*

4. The Debtor's original answer affirmed its inability to pay its debts as they matured; it admitted by silence the allegations of the involuntary petition respecting its insolvency and its status as a railroad corporation subject to reorganization under Chapter X; and it consented to and prayed for reorganization thereunder. The order of approval based on that answer constituted a holding, by necessary implication, that the denials of the preferential payments alleged as acts of bankruptcy did not raise a material issue. Even if the extravagant assumption is made that this implicit holding is erroneous, it is nevertheless the law of this case; and it is not subject to collateral attack or review.

5. The Debtor's arguments rest on the proposition that jurisdiction in a Chapter X proceeding can be challenged

* Senate Report 1916, 75th Cong., 3rd Sess. says (p. 27) that Section 149 "is designed to foreclose all direct or collateral attack upon jurisdiction or venue, once the period of appeal from an order approving the petition has expired". The cases similarly interpret this section. See: *In Re Barlum Realty Co.*, 62 Fed. Supp. 81, 86; *Country Life Apartments* v. *Buckley*, 145 F. 2d 935, 938; *In Re V. Loewer's Gambrinus Brewery Co.*, 141 F. 2d 747, 749; *In Re St. Charles Hotel Co.*, 157 F. 2d 317, 320, cert. den. 329 U. S. 799.

at any time and that an order of approval which has become final does not foreclose such a challenge. If this proposition were sustained, reorganization under Chapter X would not be practicable.

6. An involuntary petition under Chapter X must allege an act of bankruptcy. But the debtor can relieve the petitioning creditors of the burden of proving the alleged act of bankruptcy by filing an answer which embodies the substance of a voluntary petition.* Such an answer would not controvert any material allegation within the meaning of Section 142. If this were not so, the absurd result would follow of a futile trial and needless, probably dangerous and possibly fatal delay, where the debtor itself desires and urges reorganization. For such a debtor is precluded by Section 126 from filing a voluntary petition when an involuntary petition is pending. The requirement of Section 131 that an involuntary petition must allege an act of bankruptcy cannot be equated with a requirement of proof despite such an answer. Compare *Moore* v. *Linahan*, 117 F. 2d 140, 143, cert. den. 314 U. S. 628.

7. Under Sections 21k and 102, the Federal Rules of Civil Procedure are applicable to a Chapter X proceeding only to the extent that they are consistent with the provisions of Chapter X. Rule 15(a) is inconsistent with the provisions of Sections 136, 142 and 149. The "amended answer", filed without leave subsequent to the order of approval, was therefore a nullity.

8. The Debtor's contentions that the decision below is in conflict with decisions of the Court of Appeals for the Seventh Circuit and of this Court are untenable. The cases

* Indeed, such an answer is itself an act of bankruptcy under Section 3a(6).

it cites deal with an incurable absence of jurisdiction *ab initio.* Here the district court had jurisdiction of the Debtor and the subject matter, the involuntary petition was sufficient on its face, and the question (if it can be raised at all) is whether the district court lost jurisdiction because it dispensed with proof of a fact which the Debtor's answer rendered immaterial. That question must be answered in the negative.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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